

**To:** CN=Benjamin Grumbles/OU=DC/O=USEPA/C=US@EPA[]  
**From:** CN=Gregory Peck/OU=DC/O=USEPA/C=US  
**Sent:** Mon 6/30/2008 11:48:08 AM  
**Subject:** Re: Kensiington

Sunday, June 29 article.  
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Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: Benjamin Grumbles  
Sent: 06/29/2008 08:38 PM EDT  
To: Gregory Peck  
Subject: Re: Kensiington

Thanks. Very helpful. Did this come out today or sooner? Please consult OGC on next steps. I'll share with Elin.

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Sent by EPA Wireless E-Mail Services

----- Original Message -----

From: Gregory Peck  
Sent: 06/29/2008 06:06 PM EDT  
To: Benjamin Grumbles  
Subject: Kensiington

Kensington case heads to Supreme Court

By Kate Golden | JUNEAU EMPIRE

The U.S. Supreme Court announced Friday it will take on the Kensington Mine's tailings plan in next year's term.

The state of Alaska and Coeur Alaska Inc. jointly appealed in January a 9th U.S. Circuit Court of Appeals ruling that forbade the mine company from dumping tailings from the Kensington gold mine into Lower Slate Lake, near the mine. That lawsuit was brought by conservation groups: the Southeast Alaska Conservation Council, the Juneau Group of the Sierra Club and Lynn Canal Conservation Inc.

Both sides said they were looking forward to the fight ahead.

"We feel confident and optimistic about this appeal," said Tom Waldo, Earthjustice attorney representing the environmental groups. "We're looking at it as an opportunity to have the Supreme Court clarify once and for all that mines cannot dump their tailings into lakes and rivers and streams."

Meanwhile, the miners are working on getting the last permits for a paste tailings plant that - as the company told investors recently - the environmental groups are supporting.

The latest plan is to mix tailings with cement and deposit the resulting paste in a plant near Comet Beach on Lynn Canal. Tailings are the waste left over after metals are extracted from ore.

The paste-tailings permits could be ready much sooner than the Supreme Court decision: Juneau district Ranger Pete Griffin, of the U.S. Forest Service, said the federal environmental review was on track to be finished in September, including a public comment period.

The court has not announced when it will hear the case, but Waldo said a January oral argument date was likely. After the case is heard, the justices can issue an opinion at any time during that year's term.

"It's the fastest way for getting the mine into operation," said Russell Heath, SEACC executive director.

"I'm personally baffled by why they decided to go to the Supreme Court."

Spokesman Tony Ebersole of Coeur d'Alene Mines Corp., the Idaho-based parent of Coeur Alaska, said he did not know which tailings plan cost more. But he said both plans fit the company's goal to start production in the second half of 2009.

Delays "would adversely affect the company's costs and liquidity," according to Coeur d'Alene's last

quarterly report.

Coeur has put more than \$230 million into the project and plans to spend a total of \$26 million this year. The mine is expected to produce 1.4 million ounces of gold over 10 years, Ebersole said. The company valued the mine at \$307.1 million in its last quarterly financial report.

The Kensington gold mine is on the north side of Berners Bay, 45 miles north-northwest of Juneau.

The decision was one of the court's last actions at the end of this year's term, before the justices take a summer break. Its announcement means that at least four of the nine justices on the court said the case should be heard. The court grants about 100 of the 10,000 petitions it gets each year, according to its Web site.

Question: Fill or tailings?

Coeur planned to treat the tailings over from the froth-flotation process and fill Lower Slate Lake with it. What shall we call that slurry of wet, ground-up rock: Is it fill in the lake or wastewater from the mine? The answer decides which tailings plan Kensington can use.

According to the Clean Water Act and an agreement between the agencies, if it's fill material, the Corps of Engineers regulates it. If it's a wastewater discharge, the EPA deals with it.

Fill is often defined by its effect on a body of water: Material "typically deposited for the sole purpose of staying put," according to one case, or raising the level of the water body's bottom.

The EPA also says wastewater from the froth-flotation method of extracting gold from ore is a pollutant discharge, which it regulates.

Coeur had a Corps of Engineers permit. But in the ruling being appealed, the 9th Circuit said Kensington had to get an EPA permit.

Which permit gets used matters because the EPA's standard for wastewater in this situation is tougher than the Corps' standard for fill.

Coeur's Lower Slate Lake plan couldn't meet EPA standards, which for instance limits dumped wastewater's suspended solids on the order of milligrams per liter - while in this case, the tailings would be a slurry that's 40 percent solid.

One longtime observer decried the case for hinging on such technicalities.

"We have come to the point where we are arguing about a technical distinction of jurisdiction which, for the layman, doesn't make any sense at all," said J.P. Tangen, a mining attorney who does not have a financial interest in Coeur but supports the disputed lake plan.

"The real question that ought to be posed by the litigation - and which is not at all really on the table - is whether or not the placing of these tailings into Lower Slate Lake is good public policy or bad public policy," he said.

Alaska Natives join appeal

Goldbelt Inc., Juneau's urban Alaska Native corporation, petitioned alongside Coeur. Goldbelt focused not on the regulatory details but on the case's social, economic and cultural importance.

"From the outset, Coeur has recognized that the Kensington Mine lies at the heart of Tlingit traditional territory, and has taken truly extraordinary efforts to ensure that Native Alaskans are included in the prosperity that the mine promises," Goldbelt lawyers wrote.

Before the 9th Circuit ruling, Goldbelt and Coeur had an agreement that the Native corporation would build a dock at Cascade Point and ferry mine workers across Berners Bay. But the Cascade Point plan was scrapped in the aftermath of the ruling.

Goldbelt will still run mine ferries, though no longer from its own land, and provide security for the mine.

Coeur for its part has vowed to hire Alaska Natives.

But the Native corporation maintains that it was unjust for the appeals court to meddle.

"The 9th Circuit's decision to vacate the Coeur and Goldbelt permits has done far more than unfairly dash Goldbelt's most recent attempt to use its ANCSA (Alaska Native Claims Settlement Act) lands," Goldbelt's brief said. "It has struck a crippling blow to the economic aspirations of a generation of Tlingit Indians living in northern Southeast Alaska."

Worth the fight?

The U.S. Department of Justice, which represents both the EPA and the Corps, agreed with the mine and the state of Alaska that the 9th Circuit erred. But Justice also said that "while the question presented is important, it does not appear to be sufficiently important to warrant this court's review at this time."

State attorneys, on the other hand, argued for its importance beyond the case of Kensington. Two mining industry groups, the National Mining Association and the Mountain States Legal Foundation, filed briefs on behalf of the mine.

"It's not just about Kensington," said Cameron Leonard, assistant attorney general for Alaska. "Other prospective mines in Alaska are interested in the decision."

He said these would include Alaska's gold deposits at Donlin Creek, owned by Barrick Gold Corp. and NovaGold Resources Inc., and the Pebble Mine, owned by Northern Dynasty Minerals Ltd.

Mining projects contribute millions to Alaska's economy, the state wrote. And mine companies in other states could have problems if they, too, wanted to dump tailings into bodies of water.

"Many important mining operations would become impossible in those states because the tailings could not be disposed of," the state wrote. "Other operations would become more environmentally harmful."

The parties dispute the precedents here. The National Mining Association argued the 9th Circuit forbade a "particular mining practice that the industry has relied on - and federal regulators have approved - for more than 30 years."

But the Earthjustice brief argued Kensington's permit to put tailings into U.S. waters was "a one-time departure from long-established practice."

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